IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 93-7165 et al.

ANTONY BROWN, ET AL.,

Appellees-Petitioners,

v.

PRO FOOTBALL, INC., ET AL.,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

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INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the antitrust laws. The extent to which those laws are held inapplicable because of federal labor law is an issue in whose correct resolution the United States has an important interest. We file this brief because of our belief that the Court's decision resolves the issue in a manner that disserves both antitrust and labor policies, and that is likely to have significantly adverse effects that reach well beyond professional sports.

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[1] Simultaneously with this Brief, the United States is filing a motion for leave to file it in support of appellants' suggestion for rehearing in banc.

ISSUE PRESENTED

Whether the National Labor Relations Act requires employees to forego unionization in order to bring an antitrust suit against employers who, by agreement among themselves, fix the wages of the employees.

STATEMENT

1. Background.

This is an antitrust suit by professional football players who were placed on "developmental squads" of National Football League teams, and paid salaries agreed upon among the team owners. A collective bargaining agreement, which had no provision for developmental squads, expired in 1987. The teams subsequently created these squads, and after union-management negotiations about compensation for squad members reached an impasse, the teams agreed among themselves to impose the salaries unilaterally. The players who were paid these salaries sued under the antitrust laws for treble damages and an injunction.

The defendants claimed that their agreement to impose uniform salaries was protected by the nonstatutory labor exemption from the antitrust laws. The district court (Lamberth, J.) struck that defense, ruling that their immunity under this exemption expired when the prior collective bargaining agreement expired, or when the parties reached impasse in their negotiations. Brown v. Pro Football, Inc., 782 F. Supp. 125, 130-37 (D.D.C. 1991). Alternatively, it found no immunity because the provision had never been included in a contract. Id. at 137-39. Ultimately, after a jury trial, the district court

awarded damages which, when trebled, totalled over $30 million and also permanently enjoined the defendants from setting regular season salaries for any category of players. Brown v. Pro Football, Inc., 1993 Trade Case. (CCH) ¶ 70,260 (D.D.C.).

2. The Panel Decision

The panel in a split decision by Chief Judge Edwards reversed on the ground that the nonstatutory labor exemption from the antitrust laws immunized the defendants' conduct. The panel did not consider it dispositive that every case in which the Supreme Court has found this exemption applicable dealt with a collective bargaining agreement, because "the juxtaposition of policies giving rise to the exemption focuses on collective bargaining as a process, not merely on the product of that process" (slip op. 14). It noted that the National Labor Relations Act ("NLRA") similarly "focuses on collective bargaining as a process, rather than collective bargaining agreements alone" and established "a carefully defined bilateral process" protecting unions and employers alike (slip op. 16). Thus, the labor laws presume "a delicate balance of countervailing power" and "[i]njecting the Sherman Act into the collective bargaining process would disrupt this balance by giving unions a powerful new weapon, one not contemplated by the federal labor laws" (slip op. 18).

The panel was also impressed by the decisions of the Eighth and Second Circuits to adopt a broad nonstatutory labor exemption

in, respectively, Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991), and National Basketball Association v. Williams, 45 F.3d 684 (2d Cir. 1995). Moreover, it was unable to find a logical endpoint for an exemption that was tied to a collective bargaining agreement (slip op. 19, 21). It assumed there was little impact on antitrust policy, since the restraint primarily affected the labor market in the context of multi-employer bargaining (slip op. 22-26, quoting at length from Williams, supra). It concluded that the nonstatutory labor exemption "requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act" (slip op. 28).

Judge Wald dissented. In her view the majority's approach does not establish a "level playing field" but instead "sharply tilt[ed]" in favor of the owners (Dissent 1). She noted that the exemption endorsed by the majority went beyond any statutory or nonstatutory labor exemption recognized by the Supreme Court or, until recently, by the courts of appeals (Dissent 8-11). The result, she said, is to strengthen the employers' position, reduce their incentive to bargain, and allow them to impose terms not just as a bargaining tactic but as a substitute for a labor contract (Dissent, 12-16, 16-23). She concluded that "terms of employment unilaterally imposed by employers after impasse are not exempt from antitrust scrutiny under the nonstatutory labor exemption"(Dissent 24)(emphasis in original).

ARGUMENT

THE CONCERTED IMPOSITION OF TERMS BY EMPLOYERS ON EMPLOYEES IS NOT EXEMPT FROM THE ANTITRUST LAWS

The sweeping antitrust immunity adopted by the majority has no support in Supreme Court precedent. Its requirement that employees choose between the Sherman Act and the NLRA--between antitrust relief for wage fixing by an employer cartel and membership in a union--forces an unnecessary and inappropriate choice, and weakens both antitrust and labor policy. We also agree with Judges Wald and Lamberth that the implementation of multiemployer agreements on terms of employment derives nonstatutory antitrust immunity from embodiment in a collective bargaining agreement. Since these employers imposed the disputed terms of employment on their employees without such an agreement, their action was not immune from scrutiny under the antitrust laws.

1. The immunity for unilateral employer group action adopted by the majority in this case is a new construct. Contrary to the majority's view, it is not a development of the nonstatutory labor exemption recognized by the Supreme Court. As that Court carefully summarized the law in Connell Constr. Co. v. Plumbers Local 100, 421 U.S. 616, 622 (1975), "a proper accommodation between congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions."

The Supreme Court's limitation to "union-employer agreements" was not inadvertent. Well before enactment of the NLRA, concerted action by a group of employers to control the labor market was recognized as unlawful under the antitrust laws. E.g., Anderson v. Shipowners Ass'n, 272 U.S. 359 (1926). The roots of the nonstatutory exemption, on the other hand, are firmly grounded in the statutory exemption for employees, which applies only "[s]o long as a union acts in its self-interest and does not combine with non-labor groups." United States v. Hutcheson, 312 U.S. 219, 232 (1941). Not surprisingly, therefore, the nonstatutory exemption likewise protects only "the unions' successful attempt to obtain [a] provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups." Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-90 (1965). Accord, United Mine Workers v. Pennington, 381 U.S. 657, 661-64 (1965) ("a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws"). The results of the various cases addressed by the Supreme Court have been equally unequivocal: collective bargaining agreements immediately promoting the unions' interests in eliminating competition based on wages and working conditions have been uniformly upheld, while those based on employer interests (including interests in their competitors' employment standards) have been rejected. Compare American Federation of Musicians v. Carroll, 391 U.S. 99, 107-12 (1968); Jewel Tea,

supra, at 691-97; Teamsters Union v. Oliver, 358 U.S. 283, 293-94 (1959), with FMC v. Pacific Maritime Ass'n, 435 U.S. 40, 61-62 & n.20 (1978); United Mine Workers v. Pennington, supra 666-67; Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 809-11 (1945).[2]

Thus the Eighth Circuit was merely stating established law when it held that the nonstatutory exemption applies only to agreements that are "the product of bona fide arm's length bargaining" with the unions. Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).[3] Accord, In re Detroit Auto Dealers Ass'n, 955 F. 2d 457, 463 (6th Cir.), cert. denied, 113 S. Ct. 461 (1992).

2. The majority's decision, unlike the established body of law, does not base the nonstatutory labor exemption on workers' collective bargaining agreements. Instead, it creates a new, far broader implied antitrust immunity for employers based on the "process" of collective bargaining contemplated by the National Labor Relations Act, and in doing so strays far from the statutory grounding of the exemption.

While the antitrust laws and the labor laws are both expressions of fundamental national policy, courts have no roving mandate to favor one over the other. Ordinarily, of course, "[w]hen there are two acts upon the same subject, the rule is to

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[2] In Connell, even an agreement with a union was held non-exempt in part because the union did not represent the signatory firm's employees. 421 U.S. at 625-26.

[3] Even the Eighth Circuit's more recent decision in Powell v. National Football League, supra, places its roots in this well-established body of precedent.

give effect to both if possible." United States v. Borden, 308 U.S. 188, 198 (1939). Creation of a new implied antitrust immunity under the NLRA is a form of implied repeal. It is "well-established" that such repeal "is not favored and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. . . . Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary." National Gerimedical Hospital v. Blue Cross, 452 U.S. 378, 388-89 (1981)(internal citations omitted). The "accommodation" of labor and antitrust policies underlying the established exemption for union-employer agreements, Connell, supra at 622, does not imply a less stringent test, for it is firmly grounded in what "labor policy requires," ibid., and overrides the antitrust laws only to the extent there is a "conflict" with such a requirement. See Pennington, supra at 666. But in this case, there is no conflict requiring a new exemption. Rather, the employers are seeking to establish, from a statute meant to enhance workers' rights to unionize, an implied Congressional intent to create a sweeping pro-management antitrust exemption which workers can avoid only by avoiding unions. See American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965).[4] In that context, they have not come close to making the

[4] Since these workers have chosen a union and would be deprived of that choice as the price of bringing an antitrust suit, the proposed new exemption stands on its head the concept of "voluntary unionism" embodied in the labor laws. Compare Pattern Makers' League v. NLRB, 473 U.S. 95, 105 (1985)(cited at slip op. 18).

showing necessary for an immunity based on the process of bargaining.

The NLRA does primarily regulate the process of collective bargaining (slip op. 16). Under the labor laws, however, that process is not an end in itself, but a means to an end. It is a "process that look[s] to the ordering of the parties' industrial relationship through the formation of a contract." NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 485 (1960). The existing nonstatutory labor exemption, therefore, is simply a common sense recognition of the fact that the ultimate purpose of the labor laws and of the statutory labor exemption would be frustrated if such labor contracts, once reached, were declared invalid under the antitrust laws. See Meat Cutters v. Jewel Tea Co., supra, 381 U.S. 711-12 (opinion of Goldberg, J.). The only question in such cases is how far into the product market the negotiated restraints may extend.[5] Unilateral action by a group

[5] Three sets of opinions in the Pennington and Jewel Tea cases illustrate the dispute. Justice Goldberg would have held the agreements in both cases exempt from the antitrust laws as union contracts involving mandatory subjects of collective bargaining. 381 U.S. at 735. Justice Douglas would have held both agreements fully subject to the antitrust laws because they restrained the product markets. Id. at 672, 735. Justice White writing for the Court in Pennington found that wage agreement not exempt because it imposed terms outside the bargaining unit, id. at 665-66, and in Jewel Tea he thought the agreement exempt because the restraint on marketing hours had an "immediate and direct" effect on the working hours of the covered employees. Id. at 691.

A restraint on marketing hours similar to that in Jewel Tea, but adopted unilaterally by a group of employers to placate their salesmen and fend off unionization, was found not exempt in In re Detroit Auto Dealers Ass'n, supra, 955 F.2d at 461-67.

of employers to impose the terms that they should be negotiating with their employees' representatives plainly does not occupy the privileged position of being the desired end product of the bargaining process.

The majority nonetheless thought that unilateral employer agreements during the bargaining process should be totally immunized, because applying the antitrust laws would disrupt "the delicate balance of countervailing power" "by giving unions a powerful new weapon, one not contemplated by the federal labor laws" (slip op. 18). That reason is seriously mistaken, however. There are numerous federal statutes, such as the Fair Labor Standards Act and the Occupational Health and Safety Act, which favor unions by raising the baseline from which negotiations start. The antitrust laws, we submit, are no different; their application simply means that negotiations should ordinarily start from a competitive wage level rather than a level set by an employer cartel.[6]

More importantly, the labor laws themselves are not concerned with any particular balance of power between unions and employers and are not intended to equalize the parties' bargaining power. NLRB v. Insurance Agents' Int'l Union, supra,

[6] In the case of sports leagues, their joint venture characteristics might sometimes justify rule of reason treatment of unilateral league restraints on wage competition that would be considered per se illegal in different industries. See McNeil v. NFL, 790 F. Supp. 871, 896-97 (D.Minn. 1992). That is a matter separate from any labor exemption, however, and is not before the Court.

361 U.S. at 490. Indeed, the Supreme Court specifically held in that case that the Board may not attempt to "regulate the choice of economic weapons that may be used as part of collective bargaining." Id. at 490-98. But that is precisely what the majority has done here. It strips organized employees of an antitrust cause of action because it considers such a suit too powerful an economic weapon, and conversely allows those same employees to bring an antitrust action only if they surrender their right to unionize. There is simply no warrant in the labor laws for that holding and for the wholesale displacement of the antitrust laws it entails.

3. The panel's majority's creation of a new and unsound antitrust exemption for management is sufficient reason for the Court to grant rehearing. But since at least one factor in the majority's thinking was its dissatisfaction with various tests for determining when the management's nonstatutory exemption ends (slip op. 19-21 & n. 6), we wish briefly to address this point.

There is a strong argument that the recognized nonstatutory labor exemption should end when the contract containing the collective bargaining agreement has expired and the parties in post-expiration negotiations for a new contract have reached impasse. Up to that point the labor laws generally require employers to maintain the wages and working conditions set in the expired collective bargaining agreement. Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n.6 (1988); NLRB v. Katz, 369 U.S. 736, 743 (1962). If

the antitrust exemption were withdrawn before impasse, employers would risk treble damage liability under the antitrust laws by complying with the labor laws' mandate to maintain the prior collectively set terms. But once impasse occurs, employers are free under the labor laws to alter the status quo and impose new terms of employment without regard to the union's consent, so long as they are within the scope of good faith proposals previously made to the union.

In practical world of labor-management relations, however, the precise point of impasse often is not easily identified and requires a complex factual determination. Moreover, the labor laws counsel caution in declaring an impasse in bargaining. Thus, there is a justification in labor policy for the implied immunity to endure for a reasonable time after impasse--for example, for such time as would be reasonable in the circumstances for the employers to take steps to ascertain, upon advice of counsel, whether impasse has in fact occurred, whether the restraint in question would be likely to violate the antitrust laws, and, if so, to adjust their business operations so as to eliminate the proposed restraint. There is also justification in labor policy for concluding that, in no event, should antitrust immunity continue once the employers, after impasse, have jointly elected unilaterally to impose their proposed terms. For such unilateral action (which would constitute an unfair labor practice if made prior to impasse) would clearly indicate the employers' assumption that impasse has

occurred and their intention to impose their terms even without the union's agreement.[7]

CONCLUSION

For the reasons stated, the Court should grant rehearing or alternatively rehearing in banc.

Respectfully submitted.

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[7] When the members of a multi-employer group do impose terms, they may avoid antitrust liability by not acting in concert with each other--a result fully consonant with the labor laws, which leave individual employers at this point free to make temporary individual deals with the union pending adoption of a unit-wide agreement. Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404, 414-15 (1982).

CERTIFICATE OF SERVICE

I, Robert B. Nicholson, a member of the bar of this Court, hereby certify that today, May 5, 1995, I caused copies of the accompanying BRIEF FOR THE UITED STATES AS AMICUS CURIAE to be served by first class mail on:

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I certify that this brief contains no more than 3400 words.

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